Supreme Court, U.S.
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No. 95-425

In The

Supreme Court of the United States

October Term, 1995

PRO-ECO, INC.,

Petitioner,

v.

BOARD OF COMMISSIONERS
OF JAY COUNTY, INDIANA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, which held an unexercised real estate option when the challenged land use ordinance on landfills was adopted, was deprived of any protected property right for Takings Clause purposes, when (i) applicable State law provides that an option gives no right of property in and to the land that is subject to the option, and (ii) petitioner never applied for the State permits required for a landfill.

2. Whether adoption of the ordinance, subsequently declared unenforceable for non-compliance with a State-law procedural prerequisite, deprived petitioner of "substantive due process," when (i) there are concededly no "fundamental liberties" at issue, and (ii) the ordinance recites valid and facially reasonable public health reasons for its adoption, which petitioner presented no evidence to rebut.

3. Whether petitioner's later claim to monetary damages was in any event not "based on" the declaratory judgment that the ordinance was unenforceable, which judgment determined there had been non-compliance with the State-law procedural prerequisite for adoption of the ordinance, but did not determine the parties' rights as to any of the theories on which petitioner then purported to base its damages claims.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. 1-25) is reported at 57 F.3d 505. The opinion of the District Court for the Southern District of Indiana (Pet. App. 26-30) is not reported.

JURISDICTION

The decision and judgment of the Court of Appeals for the Seventh Circuit was entered June 6, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCE INVOLVED

The constitutional provisions and statutes involved are set forth in the petition (Pet. 3-5). The ordinance involved is set forth in the appendix to the petition (Pet. App. 71-75).

STATEMENT OF THE CASE

This action began as a challenge by petitioner Pro-Eco, Inc. ("Pro-Eco") to enforceability of an ordinance adopted by the respondent Board of Commissioners of Jay County, Indiana (the "County") imposing a moratorium on waste landfills. The ordinance would have barred Pro-Eco from developing such a landfill on certain real estate on which it held an unexercised option when the ordinance was adopted.

Pro-Eco obtained (Pet. App. 44-54) and successfully defended on appeal (Pet. App. 34-43) a declaratory judgment that the ordinance was unenforceable for non-compliance with a State-law procedural prerequisite -- namely, prior adoption of a comprehensive land use plan. But Pro-Eco then abandoned its effort to construct a landfill, and instead sought monetary damages from the County under various "takings," "due process" and tort theories. It specifically claimed entitlement to such damages under 28 U.S.C.

§ 2201, as "[f]urther . . . relief based on [the] declaratory judgment" addressing the enforceability of the ordinance.

The district court denied Pro-Eco's request, holding *inter alia* that any entitlement to monetary damages was not established by, and would not be "based on," the declaratory judgment on the ordinance's enforceability. Pet App. 26-30. The court of appeals affirmed, holding that Pro-Eco's asserted "constitutional" and other damages theories were in any event without merit. Pet. App. 1-25.

Pro-Eco's Statement of the Case (Pet. 5-15) sets out the history of the action in excessive (and at times argumentative) detail. However, a few points elided, distorted or omitted in Pro-Eco' Statement merit brief summary.

First, Pro-Eco's initial and amended complaints did not assert a claim to monetary damages. *See* Jay County Br. of Appellee at 3 (citing record). Indeed, Pro-Eco alleged the ordinance would cause injury "not compensable by money damages." *See id.* Thus, the declaratory judgment that the ordinance was unenforceable granted Pro-Eco all relief it had originally sought.

Second, the opening sentence of Pro-Eco's Statement -- reciting that it is "in the business of developing, constructing, and operating commercial sanitary landfills under permits issued by the Indiana Department of Environmental Management" (Pet. 5) -- is disingenuous here. In addition to the fact that Pro-Eco held only an unexercised option on the land when the ordinance was adopted, it is also uncontroverted that Pro-Eco never even applied for the State permits that

would have been required to operate a landfill on that real estate. *See* Pet. App. 63, 64 (¶¶ 27, 30).

Third, the assertion that "the District Court refused to permit Pro-Eco the opportunity to present evidence and arguments as to its damages at a hearing" (Pet. 12) ignores district court proceedings omitted in petitioner's Statement. Specifically, the County had moved for summary judgment on Pro-Eco's damages claims, including filing the "Statement of Undisputed Material Facts" required by Local Rule 56.1 of the Southern District of Indiana. *See* App. to Jay County Br. of Appellee. Among the undisputed facts stated were that Pro-Eco had offered no evidence to show that (i) the ordinance "is not rationally related to any legitimate state interests in public health, safety or welfare"; or (ii) "adoption of the ordinance was an act of disinterested malevolence or that Jay County took any allegedly unlawful action other that adopting the ordinance." *Id.* at 13 (¶¶ 39, 41).

Under the Local Rule, Pro-Eco was required to submit any material controverting such facts within fifteen days, or else have the same be "admitted to exist without controversy . . . ." It never made the required responsive filing. Thus, Pro-Eco had both the "opportunity" and the obligation to present evidence as to its damages claims, but did not do so.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct and does not conflict with the holding of any other court. Further, the decision rests on readings of Indiana State law that, in addition to being accurate, are not in any event matters that

merit review by this Court. Further still, the result below is also correct for the independent ground relied upon by the district court, which the court of appeals found unnecessary to address. This case present no issue that warrants this Court's review on *certiorari*.

1. The court of appeals correctly held (Pet. App. 5-14) that Pro-Eco was not deprived of any protected property right in a way that implicates the Fifth Amendment's Takings Clause. This Court has made clear that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), quoted in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (takings case); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (same).

When the ordinance was adopted and any supposed "taking" occurred, Pro-Eco held only an unexercised option. In Indiana, an option holder has no right to compensation for an alleged taking. Thus, in *Haney v. Denny*, 135 Ind. App. 317, 193 N.E.2d 648 (1963), a lessee with an option to purchase land taken by eminent domain claimed a share of the condemnation award. This was summarily rejected: "A lease of real estate with an option to purchase, and particularly where the option has not ripened, as in the case at bar, does not create in the lessee and future optionee an interest in the property upon which recovery may be had after the same has been taken by eminent domain." 193 N.E.2d at 654, citing *Kritz v. Moon*, 88 Ind. App. 5, 163 N.E. 112, 117 (1928) (option did not give holder "any title to the land, either legal or equitable"); 29 C.J.S. *Eminent Domain* § 196

at 1101. *Accord, Lafayette Expo Center, Inc. v. Owens*, 531 N.E.2d 508, 511 (Ind. App. 1988) (held "many times" that "option to purchase gives no right of property in and to the thing which is the subject of the option").[1]

The court of appeals also properly rejected Pro-Eco's effort to characterize the "property" being "taken" as the option contract itself (as opposed to the land subject to the option): "Indiana does not see fit to protect holders of options to buy land against others who claim an interest in the land, so we should not grant Pro-Eco more rights through the back door of recognizing its option contract as property for purposes of the Takings Clause, especially when Indiana does not even recognize options as full-fledged contracts." Pet. App. 10 (footnote omitted). This is clearly a correct reading of Indiana law -- the necessary source, under this Court's decisions, for the "creat[ion]" and "dimensions" of any property interest for which Pro-Eco can seek compensation. Pro-Eco can cite no Indiana authority that even hints an option contract would be viewed as a compensable "property interest." This Court does not in any event sit to resolve

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[1] *Lafayette Expo Center* shows that Pro-Eco's effort to limit *Haney* to "'future optionee[s]'" whose options have not yet "ripened," Pet. 21 (emphasis added by Pro-Eco), is bootless. Also, *Haney* itself makes clear an option is not "ripe" in the sense that creates a protected property interest until it has been exercised: "Until and unless appellant's option ripened -- by the passage of time, payment of lease rental, the performance of other obligations set forth in the lease, *and the exercise of such option in the manner provided*, he had no interest other than as a lessee in and to the property. And such interest could be transformed to title only upon performance of the necessary obligations in the exercise of said option." 193 N.E.2d at 654 (emphasis added). Here, Pro-Eco concedes it did not even decide to exercise its option until *after* the ordinance took effect and any supposed "taking" had already occurred. *See* Pet. 7.

whether lower Federal courts have properly interpreted State law. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review"); Supreme Court Rule 10 (considerations governing review on *certiorari*); R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice § 4.2 at 166 (7th ed. 1993) (noting omission from Rule 10 of provision of predecessor rule that *certiorari* appropriate to review improper resolution by court of appeals of State law issues).[2]

For the same reason, no ground for *certiorari* is presented by petitioner's protest of what it calls the Seventh Circuit's "overly flippant" rejection of "Pro-Eco's claim that it held a protected property right in its 'right to do business,'" Pet. 23. This, too, is purely an issue of State law. As to the merits of Pro-Eco's theory, the most telling part of its petition is the implicit (albeit presumably unconscious) acknowledgement that some degree of flippancy is indeed warranted in rejecting it. The court of appeals aptly characterized the "right to do business" thesis as a "[g]rasping for any sort of property rights," and rightly concluded that "we will not override Indiana's explicit proscription against asserting options as property rights under the Takings Clause with Pro-Eco's assertion of a nebulous substantive right that,

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[2]*See also Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986) ("We generally accord great deference to the interpretation and application of state law by the courts of appeals"); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4036 at 42-43 (1988) ("same [deferential] approach is taken" by Court "even if the state law question is a fundamental ingredient of federal statutory or constitutional questions") (footnotes omitted).

apparently, has no basis in any traditional notions of property rights." Pet. App. 10 n.5. Once again, Pro-Eco cites no Indiana authority -- and none exists -- even hinting that any "right to do business" would be a compensable property interest for "takings" purposes.[3]

Finally, Pro-Eco's constitutional theories are not rescued by alluding to alleged deprivation of "'distinct investment-backed expectations,'" Pet. App. 25, quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). As noted by the court of appeals (Pet. App. 10-11), *Penn Central* requires that such "expectations" be "reasonable," 438 U.S. at 124-25. No "reasonable expectation" exists (in the constitutional sense required for a takings claim) when an owner still needs government permits, which it has no assurance of obtaining, to allow the desired use. Indeed, *Penn Central* expressly rejected the idea that owners can

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[3]Cases cited by Pro-Eco for "right to do business" rhetoric are far afield. At issue in *Herman v. State*, 8 Ind. 545 (1856), was the State consitutional validity of a statute creating a government alcoholic beverage monopoly. *Eaton Corp. v. Appliance Valve Corp.*, 526 F. Supp. 1172, 1180-81 (1981), *aff'd*, 688 F.2d 842 (7th Cir. 1982), involved an effort on claimed "trade secrets" grounds to enjoin business activities of an ex-employee; also, the case it quotes (quoted in turn by Pro-Eco) is from California, not Indiana. In briefing below, Pro-Eco advanced its "right to do business" thesis as a supposed "tort" rather than a "takings" claim, relying on *Miller v. Ortman*, 235 Ind. 641, 136 N.E.2d 17, 34 (1957) -- also not a "takings" case. It then conceded that Indiana cases "limit[] the compensable tortious conduct contemplated by the *Miller* court to conduct which damages 'protectable property' such as the goodwill of the business, its contracts, and confidential customer information." Pro-Eco Br. of Appellant at 29. None of this is involved here; and none of these cases suggests Indiana views an amorphous "right to do business" as a compensable "property interest" in the takings context.

"establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." *Id.* at 130. The unreasonableness of any such expectation is especially apparent when, as here, the complaining party never even applied for the necessary State permits.

2. Pro-Eco presents no serious issue of any violation of "substantive due process," which requires it to show either (i) infringement on "'fundamental' liberty interests," *Reno v. Flores*, 507 U.S. ___, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1, 16 (1993), or (ii) that the ordinance was "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," *Euclid v. Amber Realty Co.*, 272 U.S. 365, 385 (1926). As to the first, Pro-Eco does not claim any "fundamental liberties" are at issue.[4]

Instead, Pro-Eco argues it was denied an opportunity to present evidence that the ordinance violated *Euclid* standards. In addition to having no import for any case but this one, this argument fails for two independent reasons. The first involves familiar principles of "rational basis" review pointed out by the court of appeals, which noted the public health reasons stated by the County in adopting the ordinance:

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[4]As held below, "'[d]epositing garbage in landfills is not exactly a fundamental right,'" but instead a "'highly regulated industry.'" Pet. App. 19, quoting *Mid-American Waste Sys. v. City of Gary*, 49 F.3d 286, 291 (7th Cir. 1995). Further, "'[c]orporations do not have fundamental rights,'" a category that "describes only personal liberties." Pet. App. 19, quoting *Mid-American*, 49 F.3d at 291.

> Concern for public health is a sufficient reason on its face to pass the *Euclid* test, and "governmental action passes the rational basis test if a sound reason may be hypothesized. The government need not prove the reason to a court's satisfaction."

Pet. App. 19-20, quoting *Northside Sanitary Landfill, Inc. v. City of Indianapolis*, 902 F.2d 521, 522 (7th Cir. 1990).

The second reason Pro-Eco's argument fails is that it in fact refused to respond when it had both the opportunity and the obligation to present any evidence that the ordinance was allegedly "arbitrary and unreasonable. The County had moved for summary judgment on Pro-Eco's damages claims, filing the "Statement of Undisputed Material Facts" required by S.D. Ind. Rule 56.1. These undisputed facts included that Pro-Eco had offered no evidence to show that (i) the ordinance "is not rationally related to any legitimate state interests in public health, safety or welfare"; or (ii) "adoption of the ordinance was an act of disinterested malevolence or that Jay County took any allegedly unlawful action other that adopting the ordinance." *See* Statement of the Case, *supra* at 4.

Under the Rule, Pro-Eco was required to submit any material controverting such facts within fifteen days, or else have the same be "admitted to exist without controversy . . . ." It never made this required responsive filing. Hence, Pro-Eco may not legitimately raise at any stage of these proceedings -- much less in petitioning this Court for *certiorari* -- that it was "denied" the opportunity to present whatever evidence it supposedly possessed that the ordinance fails "substantive due process" standards.

3. The result below is also correct for the independent reason relied upon the district court -- namely, that the monetary relief belatedly sought by Pro-Eco was not "based on" (within the meaning of 28 U.S.C. § 2201) the earlier declaratory judgment that the ordinance was invalid for failure first to have adopted a comprehensive land use plan. Pro-Eco's argument that its money damages claims are "based on" that declaratory judgment is incorrect, and in any event raises no issue meriting this Court's attention.[5]

Pro-Eco's argument simply ignores critical language of the statute. The further relief "based on" a declaratory judgment that is authorized by 28 U.S.C. § 2201 is "against any adverse party *whose rights have been determined by such*

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[5]Also without merit is Pro-Eco's protest that "the Seventh Circuit's failure to address this statutory issue, in favor of leaping ahead to decide issues of constitutional import," violates the rule that "'normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case,'" Pet. 19, quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984). This is misplaced. The principle animating the rule is that courts should not declare *un*constitutional action by a State (as in *Escambia County*) or a coordinate branch, without first exploring alternative decisional bases that do not raise the sensitive issues of Federalism or relations among the branches entailed in any such declaration. This does not mean courts must refrain from holding that a supposed "constitutional" challenge is meritless. Contrary to Pro-Eco's rhetoric, what the court of appeals decided here was that the "issues" Pro-Eco raised were *not* of "constitutional import". Pro-Eco's claim that the court should "first" have decided the "statutory issue" under § 2201 is especially incongruous since Pro-Eco had to win on *both* its statutory *and* its "constitutional" claims to prevail. Had the court "first" decided the statutory issues, the only possible results would have been (i) affirming the district court (in which case Pro-Eco would lose); or (ii) deciding Pro-Eco was "right" on the statute, but -- as the court held -- wrong on the "constitutional" claims (in which case Pro-Eco would also lose).

judgment" (emphasis added). Here, the only "rights" of the County "determined" by the declaratory judgment were that it could not enforce the challenged ordinance, due to the State-law procedural flaw of not having first adopted a comprehensive land use plan. However, that judgment did *not* "determine[]" a host of issues involving the County's "rights" in any asserted action for monetary damages arising from the adoption of the ordinance. Those issues, which the declaratory judgment on enforceability did even purport to address, involve the very matters on which the court of appeals held Pro-Eco's claims were without merit.

By contrast, decisions allowing supplemental relief under § 2201 typically involve circumstances where the right to such relief "follow[ed] absolutely from" a declaratory judgment that decided "the only factual and legal predicate necessary for recovery," *Horn & Hardart Co. v. National Rail Passenger Corp.*, 843 F.2d 546, 548, 549 (D.C. Cir.) (lease expressly entitled lessor to liquidated damages and costs where lessee failed to vacate upon termination), *cert. denied*, 488 U.S. 849 (1988), or the declaratory judgment "conclusively established" the right to the supplemental relief sought, *Besler v. United States Dep't of Agriculture*, 639 F.2d 453, 455 (8th Cir. 1981). *Compare, e.g., Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F.2d 518, 522 (2d Cir.) (right to infringement damages "based on" declaratory judgment as to copyright ownership, where only apparent fact issue was calculation of damages), *cert. denied*, 358 U.S. 831 (1958), *with, e.g., Penthouse Int'l, Ltd. v. Barnes*, 792 F.2d 943, 950 (9th Cir. 1986) (district court abused discretion by granting further relief not needed to effectuate its declaratory judgment, and involving issues not decided in original part of bifurcated trial).

Whatever variances in nuance and emphasis may be extracted from the body of district and circuit court opinions on § 2201, it is clear there is no raging division on issues of burning import that demands resolution by this Court. It is clearer still that this case -- where the "further relief" sought ranges far beyond the rights determined by the declaratory judgment, and involves theories of recovery that the court of appeals correctly held meritless -- is a thoroughly unsuitable vehicle for providing guidance on the statute, even if any guidance were needed.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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